TRANSCRIPT OF RECORD

[redacted]

(23,450)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 392.

D. R. WILDER MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

CORN PRODUCTS REFINING COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF GEORGIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 9, 1914.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Appeals of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals of Georgia before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Corn Products Refining Company Defendant in Error and D. R. Wilder Manufacturing Company Plaintiff in Error wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the con-
2 struction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said D. R. Wilder Manufacturing Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court, N. D. Georgia.]

O. C. FULLER,
Clerk of the District Court of the United States
for the Northern District of Georgia.

Allowed by

BENJAMIN H. HILL,
Chief Judge of the Court of Appeals of Georgia.

And allowed to operate as a supersedeas on bond for $3,200.00 being given.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

3 [Endorsed:] Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

4 UNITED STATES OF AMERICA, *ss:*

To Corn Products Refining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of Georgia wherein D. R. Wilder Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of Georgia, this 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

5 Copy of the within citation received and all other service waived. This 6th day of Nov. 1912.
Nov. 6th.

CORN PRODUCTS REFINING COMPANY,
By JAMES W. AUSTIN,
Its Attorney.

[Endorsed:] Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

6 UNITED STATES OF AMERICA,
State of Georgia:

To the Honorable Benjamin Harvey Hill, Chief Judge of the Court of Appeals of Georgia:

The petition of D. R. Wilder Manufacturing Company respectfully shows:

On or about the 2nd day of October, 1912, the Court of Appeals of the State of Georgia returned a final judgment against your petitioner in a certain cause wherein the Corn Products Refining Company, a corporation, was plaintiff, and your petitioner was defendant, for the sum of $2,608.49 and costs, and directed that the remittitur be sent to the City Court of Atlanta for execution in accordance with the judgment theretofore rendered by the said City Court of Atlanta,

as will appear by reference to the records and proceedings in said cause; and that the said Court of Appeals is the highest court of said State in which a decision in said suit could be had.

And that your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error.

Your petitioner relied in the City Court of Atlanta, and in the Court of Appeals of Georgia upon the constitution and laws of the United States as a full and complete defense to the claim of
7 the plaintiff. Petitioner says that it appears by the said judgment and proceedings that in said judgment and proceedings in said cause manifest errors were committed to the prejudice of your petitioner, because it shows that in said suit rights, privileges and immunities were claimed by your petitioner under the constitution and laws of the United States, and the decision in said cause was against the rights, privileges and immunities specially set up and claimed by your petitioner under the said constitution and statutes, as will more fully appear from the record, the answer filed by your petitioner, together with the bill of exceptions and assignments of error under which said cause was appealed from the City Court of Atlanta to the Court of Appeals of Georgia, all of which your petitioner prays to be read and considered as a part hereof.

Your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statute of the United States for such cases made and provided, because your petitioner claimed, and does now claim, that it had a right, privilege and immunity under the Act approved July 2, 1890, entitled "An Act To Protect Trade And Commerce Against Unlawful Restraints And Monopolies," from being sued or held liable for the sales set out in the plaintiff's suit, for the reason that the said sales constituted a part of contracts in restraint of interstate trade and commerce in violation of the aforesaid act, and specifically de-
8 clared to be illegal and unenforcible under the aforesaid act, which said right, privilege and immunity was specifically set up and claimed by your petitioner, as appears by the record and proceedings of said cause, and the City Court of Atlanta and the Court of Appeals of the State of Georgia by the decision herein complained of decided against said right, title, privilege and immunity.

Wherefore, petitioner prays allowance of the writ of error returnable in the Supreme Court of the United States, and for citation and supersedeas, that the errors complained of by your petitioner may be examined and corrected, and the said judgment reversed; and your petitioner will ever pray.

D. R. WILDER MANUFACTURING COMPANY,
By MARION SMITH, *Its Attorney.*

9 In the Court of Appeals of the State of Georgia.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

On this the sixth day of November, 1912, the above named plaintiff in error presented its petition for the allowance of a writ of error from the Supreme Court of the United States and its bond for a supersedeas, and prayed an order allowing the said writ of error and allowing the same to operate as a supersedeas.

Now, therefore, this court being the court which rendered the judgment complained of, and the highest court in which a decision in said case can be had, and the undersigned Chief Judge thereof, does hereby allow the said writ of error and order that the same shall operate as a supersedeas on the petitioner in error giving bond in the sum of three thousand two hundred ($3,200.00) dollars, which said bond has this day been approved by me.

BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

10 Know all men by these presents, That we, D. R. Wilder Manufacturing Company, as principal, and D. R. Wilder, as sureties, are held and firmly bound unto Corn Products Refining Company in the full and just sum of three thousand two hundred dollars, to be paid to the said obligee, its successors, and assigns, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of November, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at a Court of Appeals of Georgia in a suit depending in said court, between D. R. Wilder Manufacturing Company and Corn Products Refining Company, a judgment was rendered against the said D. R. Wilder Manufacturing Company and the said D. R. Wilder Manufacturing — having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Corn Products Refining Company citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said D. R. Wilder Manufacturing Company shall prosecute its writ

of error to effect, and answer all damages and costs if it fail
11 to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

D. R. WILDER MANUFACTURING COMPANY,
By D. R. WILDER, *Pres.* [SEAL.]
D. R. WILDER. [SEAL.]

Sealed and delivered in presence of
[SEAL.] HARRY F. ANSLEY,
N. P., Fulton Co., Ga.

Approved by
BENJAMIN H. HILL,
Chief Judge Court of Appeals of Georgia.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk Court of Appeals of Georgia.

12 In the Supreme Court of the United States.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

The above named plaintiff in error in connection with the petition for a writ of error herein to the Supreme Court of the United States, respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of Georgia, there is manifest error in this, towit:

First. The said court erred in sustaining the City Court of Atlanta in holding that the defendant's answer did not set out a good and complete defense, it appearing from said answer that the sales for which suit was brought were directly connected with and a part of certain contracts which were illegal and void and unenforcible under the Act of Congress approved July 2, 1890, entitled "An Act To Protect Trade And Commerce Against Unlawful Restraints And Monopolies."

Second. The Court of Appeals erred in holding that the contracts under which the sales sued for were made were not, under the allegations of the answer, illegal and void and unenforcible
13 under the aforesaid Act of Congress.

Third. The Court of Appeals erred in holding that under the allegations of the answer a recovery could be had upon the account sued on, it appearing from the said answer that the plaintiff in the City Court of Atlanta was an illegal combination intended and having the effect directly to restrain and monopolize trade and commerce in violation of the aforesaid Act of Congress, and that the account was made up within the knowledge of above parties with direct reference to, and in execution of contracts which had for their

object and which had directly the effect to accomplish the illegal ends for which the plaintiff was organized.

Fourth. Because the Court of Appeals erred in holding that the City Court of Atlanta did not err in striking the answer of the defendant and in giving judgment for the plaintiff because the City Court of Atlanta erred in holding that the contracts between the parties shown by the answer with reference to which and in execution of which the account sued on was made up were not illegal and void, under the aforesaid Act of Congress.

Fifth. The said Court of Appeals erred in sustaining the City Court of Atlanta in striking the answer of the plaintiff in error, and in holding that the said answer did not constitute a good and sufficient defense to the plaintiff's suit under the aforesaid Act
14 of Congress approved July 2, 1890.

Sixth. The Court of Appeals erred in rendering the aforesaid judgment in that the same is repugnant to and in conflict with the laws of the United States, and especially the aforesaid Act of Congress approved July 2, 1890.

Seventh. The Court of Appeals erred in construing the aforesaid Act of Congress as not rendering illegal and void the contract between the parties under which the sales sued on were made, and as not rendering illegal and void and unenforcible the said sales under the said contract.

Wherefore, for the above and foregoing errors petitioner in error prays that the judgment of the Court of Appeals of the State of Georgia be set aside and annulled, and reversed, and this case remanded to the City Court of Atlanta with directions to vacate the judgment entered by it herein, and to enter an order overruling and refusing the motion to strike the defendant's answer.

MARION SMITH,
Attorney for Plaintiff in Error.

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk Court of Appeals of Georgia.

15 In the Court of Appeals of the State of Georgia.

D. R. WILDER MANUFACTURING COMPANY, Plaintiff in Error,
vs.
CORN PRODUCTS REFINING COMPANY, Defendant in Error.

Præcipe.

To the Clerk of the Court of Appeals of the State of Georgia:

The above named plaintiff in error does hereby request and require that you incorporate in the record in this cause to the Supreme Court of the United States, the following, towit:

The bill of exceptions.

The transcript of record in the Court of Appeals of Georgia from the City Court of Atlanta.

The opinion of the Court of Appeals and the dissent of Judge Russell.

The judgment of the Court of Appeals.

The original writ of error and citation.

Copies of the petition for the writ, the order allowing the writ, the bond, the assignment of errors, and of this præcipe.

This the 6th day of November, 1912.

D. R. WILDER MANUFACTURING COMPANY,
By MARION SMITH, *Its Attorney.*

16 Service of the above præcipe acknowledged, copy received, and further service waived.

This the 6th day of November, 1912.

CORN PRODUCTS REFINING COMPANY,
By JAMES W. AUSTIN, *Its Attorney.*

Filed in office Nov. 6, 1912. Logan Bleckley, Clerk, Court of Appeals of Georgia.

17 GEORGIA,
Fulton County:

Be it remembered that heretofore in the City Court of Atlanta, his honor Judge H. M. Reid, Judge of said court presiding, in the case of Corn Products Refining Company vs. D. R. Wilder Manufacturing Company, there came on to be heard the motion of the plaintiff to strike the answer of the defendant, and on the 15th day of September, 1911, the court entered an order granting said motion and striking the defendant's answer, to which said ruling and order the defendant then and there excepted, and now excepts, and assigns the same as error in law on the part of the court because said answer set out a good defense to said suit.

The defendant filed its exceptions pendente lite to the said ruling and the same were certified and entered upon the minutes, as provided by law, and the defendant now assigns error upon said exceptions pendente lite so filed and certified.

Subsequently thereto, towit, on the 22nd day of September 1911, the court permitted a verdict to be entered and rendered a judgment thereon in favor of the plaintiff against the defendant for the full amount of the suit and interest, the said verdict being entered and judgment rendered without evidence being introduced, and being allowed by the court because the defendant's answer had
18 been stricken. Having erroneously stricken defendant's answer, said ruling being controlling in the case, and entering into and effecting the further progress and final result of the case, the defendant, therefore, says that the court erred in permitting said verdict to be rendered and in entering up said judgment and excepts thereto and assigns the same as error in law on the part of the court, for the reason that the court having erred in striking

said answer, the verdict and judgment could not be and are not a legal termination of said case.

The defendant specifies the following portions of the record as material to a clear understanding of the errors complained of, towit:

The petition of the plaintiff.

The answer of the defendant.

The motion of the plaintiff to strike the answer of the defendant.

The order of the court granting said motion, and striking the defendant's answer.

The defendant's exceptions pendente lite, and the certificate of the court thereto.

The verdict and judgment.

19 And now, within the time allowed by law, the defendant, the D. R. Wilder Manufacturing Company, presents this, its bill of exceptions, and prays that the same be signed and certified, that the errors alleged to have been committed may be reviewed and corrected by the Court of Appeals of the State of Georgia.

This the 29th day of September, 1911.

SMITH, HASTINGS & RANSOM,
Attorneys for Defendant, D. R. Wilder Manufacturing Company.

Post Office address: Atlanta, Ga.

I do certify that the foregoing bill of exceptions is true and specifies all the record and all the evidence material to a clear understanding of the errors alleged to have been committed. The Clerk of this Court is ordered to make out a complete copy of such portions of the record in this case as are in this bill of exceptions specified, and to certify the same as such, and cause the same to — transmitted to the Court of Appeals of the State of Georgia, that the errors alleged to have been committed may be reviewed and corrected.

20 This 29th day of September, 1911.

H. M. REID,
Judge City Court of Atlanta.

Service of the within bill of exceptions and certificate thereto acknowledged. Copy received. All other and further service waived.

This the 29th day of September, 1911.

JAS. W. AUSTIN.

Filed in office Oct. 3, 1911. Arnold Broyles, Clerk.

GEORGIA,
Fulton County:

I hereby certify, That the foregoing bill of exceptions, hereunto attached, is the true original bill of exceptions in the case stated, towit: D. R. Wilder Mfg. Co., plaintiff in error, vs. Corn Products Refining Co., defendant in error, and that a copy hereof has been made and filed in this office.

Witness my signature and the seal of court affixed this 9 day of October, 1911.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

21 (Endorsed:) Case No. 3771. Court of Appeals of Georgia. October Term, 1911. D. R. Wilder Manufacturing Company v. Corn Products Refining Company. Bill of Exceptions. Filed in office Oct. 14, 1911. W. E. Talley, D. C. C. A. Ga.

22 (*Petition.*)

City Court of Atlanta, May Term, 1909.

20512.

CORN PRODUCTS REFINING CO.
vs.
D. R. WILDER MANUFACTURING CO.

GEORGIA,
Fulton County:

To the City Court of Atlanta:

The petition of the Corn Products Refining Company respectfully shows:

1. That the defendant, the D. R. Wilder Manufacturing Company, is a corporation of said State, with its principal office and place of business in the City of Atlanta, in said Fulton County.

2. Your petitioner shows that the defendant is indebted to the said Corn Products Refining Company in the sum of Twelve hundred and forty-seven dollars and eighty five cents ($1247.85) for goods sold and delivered to the defendant as per invoice of date of January 26th, 1909, hereto attached as "Exhibit A" to this petition, with interest at seven per cent per annum on said principal sum since February 1st, 1909.

3. Your petitioner shows that the defendant is further indebted to the said Corn Products Refining Company in the sum of nine hundred and fifty four dollars and fifty nine cents ($954.59) for goods sold and delivered to the defendant as per invoice of
23 date of January 27th, 1909, hereto attached as "Exhibit B" to this petition with interest at seven per cent. per annum on said principal sum since February 2nd, 1909.

4. Your petitioner shows that the defendant although so demanded, has not paid said sums, nor any part thereof.

Wherefore, petitioner prays that process may issue requiring the said D. R. Wilder Manufacturing Company to be and appear at the next term of said court to answer petitioner's complaint.

KONTZ & AUSTIN,
Petitioner's Attorneys.

"EXHIBIT A."

Telephone 6410 Broad. Duplicate. Invoice No. 823.

Corn Products Refining Company.

Order No. Pro. 1052.
Your Order No. C 11306-342-13394.

26 BROADWAY,
NEW YORK, *January* 26, 1909.

Sold to D. R. Wilder Manufacturing Co., Atlanta Ga.
Terms: Net Cash Ten days C. C. L. 82. C. & N. W. I. C. C. of Ga. at Chattanooga.

Packages.	Description.	Lbs.	Price.	Amount.
1	Tank 42′ Mixing Corn Syrup (unmixed). Gross 88080. Tare 28940. Freight Prepaid. Broker.—H. H. Whitcomb. Marks.	59140	2.11	1247.85

24 "EXHIBIT B."

Telephone 6410 Broad. Duplicate. Invoice No. 823.

Corn Products Refining Company.

Order No. Pro 477.
Your Order No. C 11235-342-13394.

26 BROADWAY,
NEW YORK, *January* 27, 1909.

Sold to D. R. Wilder Manufacturing Co., Atlanta, Ga.
Terms: Net Cash Ten days.

Packages.	Description.	Lbs.	Price.	Amount.
60	Barrels Conf. 3 A. Corn Syrup (unmixed). Gross 43423. Tare 3482. Broker.—H. H. Whitcomb Co. Freight Prepaid.	39941	2.39	954.59

A. C. L. 31952 C. P. & St. L. M. & O. C. of Ga. at Chattanooga, or Birmingham.

Filed in office this the 13th day of April, 1909. J. J. Hobby, D. Cl'k.

25 STATE OF GEORGIA,
County of Fulton:

CORN PRODUCTS REFINING COMPANY
v.
D. R. WILDER MANUFACTURING COMPANY.

To the Sheriff, or his Deputy, of said County, Greeting:

The defendant is hereby required, personally or by attorney, to be and appear at the City Court of Atlanta, to be held in and for said county, on the first Monday in May 1909, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed, as to justice shall appertain.

Witness, the Honorable H. M. Reid, Judge of said court, this 13th day of April, 1909.

J. J. HOBBY,
Deputy Clerk.

26 GEORGIA,
Fulton County:

Served the defendant D. R. Wilder Manufacturing Company, a corporation by serving W. J. Peabody its Secretary and Treasurer by leaving a copy of the within writ and process with him in person at the office and place of doing business of said corporation in Fulton County, Ga.

This April 15th, 1909.

J. W. CHAMBERS, *D. Sh'ff.*

27 (*Answer.*)

GEORGIA,
Fulton County:

And now comes the defendant, the D. R. Wilder Manufacturing Co., and answering the plaintiff's petition shows the court the following:

1. The defendant admits paragraphs one and two.

2. The defendant denies paragraphs two and three in the manner and form in which the same are alleged, and further answering said paragraphs the defendant shows that it admits the purchase of the goods at the price alleged in said paragraphs and in Exhibit "A" and Exhibit "B" of said petition. The defendant, however, denies that there can be a legal recovery of the purchase price of said goods for the reason hereinafter set out.

3. The defendant further shows to the court that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, being a corporation formed by the consolidation of the Glucose Refining Co., the American Glucose Co., the United States Sugar Refining Co., the Pope Glucose Co., the Illinois Sugar Refining Co., the National Starch Co., the United Starch Co., the Corn Products Co., the Warner Sugar Refining Co., the St. Louis Syrup & Preserving Co., the New York Glucose Co., and many other firms

and corporations which before the formation of the plaintiff company were independent and competing manufacturing con-
28 cerns, manufacturing and selling goods of the kind sued for in the plaintiff's complaint. Said combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the plaintiff, and did result in a monopoly of interstate trade and in greatly advancing the price at which said commodities were sold, and constituted a combination or conspiracy in violation of the federal statute.

4. Shortly after said combination was effectuated, and while the plaintiff controlled an absolute monopoly of the glucose and grape sugar industry, the plaintiff inaugurated a system of contracts with its purchasers which it referred to as its "profit-sharing plan." Under said system of contracts it agreed to give its purchasers a rebate of some certain amount per hundred pounds upon all purchasers of glucose or grape sugar during any years, provided, and upon the condition that, the said purchaser, during the following year, gave to the said Corn Products Refining Co., its exclusive patronage. All of said contracts were substantially similar, except that the amount of the rebate varied from year to year. The defendant attaches hereto as Exhibit "A" a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906 provided it gave to the plaintiff its exclusive trade during the year 1907.
29 A substantially similar contract was entered into relative to trades in 1907, and relative to trades in 1908 and 1909, with this difference relative to the two latter years, viz: that the rebate was advanced from 10 cents to 15 cents per hundred pounds.

5. The defendant alleges that substantially similar contracts were given to practically all consumers of glucose and grape sugar in the United States. The defendant alleges that at the time said so-called profit sharing plan was originated, the plaintiff was the sole firm or corporation in the United States manufacturing and selling glucose and grape sugar, having absorbed all independent and competing concerns, and this defendant and the other manufacturing plants which consumed glucose or grape sugar in the United States were forced to purchase from the plaintiff upon whatever terms could be made, a part of which terms are embraced in this so-called profit sharing plan.

6. Under the working of said system of contracts each purchaser of glucose or grape sugar was placed and kept in a situation whereby if any independent or competing firm or corporation entered into the business of manufacturing or selling glucose or grape sugar, such purchaser by dealing with such independent or competing firm would sacrifice a large rebate on the previous year's business by giving his trade to such independent or competing concern. The
30 entire sysfem of contracts herein outlined, and the contracts hereinafter referred to, were designed for the purpose of preventing competition from arising in the business which had pre-

viously been monopolized by the plaintiff company, and did, in fact, have such effect to a large extent.

7. Defendant alleges that the plaintiff advanced the price of glucose and grape sugar to such exorbitant extent that a few independent concerns have been created and are now attempting to compete with the plaintiff, and are offering lower prices than those asked by the plaintiff, but are having great difficulty in doing so because of the fact that the plaintiff has heretofore obtained a hold upon so large a part of the consumers through the working of the system of contracts heretofore described as the so-called profit sharing plan. The plaintiff is claiming that any consumer who now trades with the said independent concerns, forfeits to the plaintiff the rebate on the 1908 business, and is thereby coercing a large number of consumers into buying from the plaintiff at its advanced prices. The defendant alleges that the prices charged by the plaintiff, even after deducting the rebates, are in excess of the prices charged by the independent firms that are now attempting to compete with the plaintiff, and the prices heretofore charged for glucose and grape
31 sugar price to organization of the plaintiff company, but that the immediate sacrifice claimed by the plaintiff against any consumer who trades with independent concerns as heretofore described, is so great, and so many consumers are uncertain that said independent concerns will continue to do business, that the plaintiff is able to control and coerce a large part of the trade, and still controls a partial monopoly of the trade.

8. The defendant shows that each purchase made by it, and by other purchasers, from the Corn Products Refining Co., contained the following clause in the contract of purchase: "The goods herein sold are for your own consumption only and not for resale."

9. The defendant shows that the sales for the purchase price of which suit is brought were made under the system of contracts herein outlined. The defendant shows that the original combination, the series of contracts known as the profit sharing plan, the provision heretofore referred to in the contracts of sale, and the individual sales, all constituted elements of one general plan or design, which in its entirety, constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal Anti Trust Act of July 2, 1890. The defendant alleges that the account on which suit
32 is brought was made up within the knowledge of both it and the plaintiff with direct reference to and in execution of the agreement heretofore referred to, and that there cannot be a recovery upon said account.

10. Defendant avers that under its contract with the plaintiff for 1908, the plaintiff agreed to allow the defendant a rebate of 15 cents per hundred pounds on all purchases of glucose and grape sugar during the year 1908 upon the conditions heretofore set out. The defendant avers that 15 cents per hundred pounds upon all of its purchases for 1908 amounts to the sum of seventeen hundred and ninety seven dollars ($1,797.01) and one cent. The defendant alleges that the limitation or condition in said contract that it should

trade only with the plaintiff, is illegal, being in restraint of interstate trade in violation of the Federal Anti-Trust Act as heretofore alleged, and is, therefore, not binding upon this defendant, and that this defendant is entitled to said amount notwithstanding its failure to comply with said condition. The defendant therefore prays that said amount be allowed as a counter claim against the plaintiff and that it may have judgment for said amount.

Wherefore, your defendant prays that it be hence dismissed with its reasonable costs.

(Signed) SMITH & HASTINGS,
Defendant's Attorneys.

33 EXHIBIT "A."

Corn Products Refining Company.

26 BROADWAY, NEW YORK, *March* 9, 1907.

The D. R. Wilder Mfg. Co., Atlanta, Ga.

GENTLEMEN: This company recognizing the fact that its own prosperity, in a great measure, is interwoven with the good will and cooperation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage.

This company inaugurates such a policy of profit-sharing by announcing that it will set aside out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to ten cents per hundred pounds on all shipments of glucose and grape sugar (Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906.

This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907, you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment.

34 With the assurance of steadfast cooperation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing distribution annually to the full extent that its earnings may warrant.

Yours very truly,
CORN PRODUCTS REFINING COMPANY,
E. B. WAEDEN.

Filed in office this the 4th day of May, 1911. T. C. Miller, D. Cl'k.

(*Motion to Strike Plea.*)

GEORGIA,
Fulton County:

And now comes the plaintiff in the case above stated, by its attorneys of record, and moves to strike the plea of the defendant in said case, and to enter judgment for the full sum, principal and interest, of the plaintiff's demand therein.

This 8 day of February, 1911.

KONTZ & AUSTIN,
Plaintiff's Attorneys.

35 (*Order.*)

Read and considered. It is ordered that the above motion be filed of record and entered on the motion docket, and that the defendant show cause before me at 10 o'clock a. m., on the 11 day of March 1911, why said motion be not granted and judgment entered as prayed.

This 8 day of Febr'y, 1911.

H. M. REID,
Judge C. C. A.

Due and legal service of the above motion and of the rule nisi thereon is hereby acknowledged. Copy received.

This 8 day of Febr'y, 1911.

SMITH, HASTINGS AND RANSOM,
Attorneys for Defendant.

Filed in office this the 10th day of Feb. 1911. F. M. Myers, D. Clerk.

(*Order.*)

This motion is sustained and the defendant's plea is stricken. The defendant never having made any contract to buy exclusively from the plaintiff this case does not, in my opinion come within the decision in the case of Continental Wall Paper Co. v. Voight, 212 U. S. 227. Sept. 15th, 1911.

H. M. REID, *Judge.*

36 (*Exceptions Pendente Lite.*)

GEORGIA,
Fulton County:

The plaintiff's written motion to strike the answer of the defendant having come on to be heard in said court, his Honor H. M. Reid of said court presiding, the court on the 15th day of September, 1911, entered an order and judgment sustaining said motion and striking

the defendant's answer, to which order and judgment the defendant then and there excepted, and now excepts, and assigned and now assigns the same as error in law on the part of the court for the reason that said motion was not well founded in law and should have been overruled and the defendant's answer should not have been stricken; and now, within the time allowed by law, the defendant presents this, its exceptions pendente lite, and prays that the same be certified by the court and entered on the minutes as provided by law.

This the 18th day of September, 1911.

SMITH, HASTINGS AND RANSOM,
Defendant's Att'ys.

I hereby certify that the foregoing bill of exceptions pendente lite is true. Let the same, together with this certificate, be entered on the minutes. This the 18 day of September, 1911.

H. M. REID,
Judge C. C. A.

Filed in office this the 18th day of Sept. 1911. T. C. Miller, D. Cl'k.

37 (*Verdict.*)

We the jury find for the plaintiff against the defendant $2,202.44 principal and $406.05 interest.

C. H. LEDFORD, *Foreman.*

This the 22nd day of September 1911.

(*Judgment.*)

Whereupon, it is ordered, considered and adjudged by the court that the plaintiff, the Corn Products Refining Company do recover of the defendant the D. R. Wilder Manufacturing Company two thousand two hundred and two dollars and forty four cents principal and four hundred and six dollars and five cents interest together with future interest on said principal at the rate of seven per cent per annum and — dollars costs of suit.

This September 22nd, 1911.

JAS. W. AUSTIN,
Plaintiff's Attorney.

38 STATE OF GEORGIA,
County of Fulton:

I hereby certify, That the foregoing pages, hereunto attached, contain a true transcript of such parts of the record as are specified in the bill of exceptions and required, by the order of the Presiding Judge, to be sent to the Court of Appeals in the case of D. R. Wilder Mfg. Co., plaintiff in error, vs. Corn Products Refining Co., defendant in error.

Witness my signature and the seal of court affixed this the 9 day of October, 1911.

[SEAL.] ARNOLD BROYLES,
Clerk Superior Court, Fulton County, Georgia,
ex-Officio Clerk City Court of Atlanta.

39 (Endorsed:) Case No. 3771. Court of Appeals of Georgia, October Term, 1911. D. R. Wilder Manufacturing Co. v. Corn Products Refining Company. Transcript of Record. Filed in office Oct. 14, 1911. W. E. Talley, D. C. C. A. Ga.

40

782.

Court of Appeals of Georgia.

Case No. 3771.

WILDER MANUFACTURING COMPANY
v.
CORN PRODUCTS REFINING CO.

By the COURT:

Suit was brought upon a contract, to recover the purchase-price of goods sold and delivered. The defendant pleaded that the plaintiff was an unlawful combination and conspiracy, formed for the purpose of restraining interstate trade, in violation of the acts of Congress; that through a system of contracts with various purchasers it had secured a monopoly of the business, and that the defendant was forced to purchase the commodity from the plaintiff upon whatever terms could be made. The contract of sale was in writing, and provided that the seller would set aside, out of its profits from the manufacture and sale of the commodity for a certain period, an amount equal to ten cents per hundred pounds on all purchases of the commodity which should be made by the plaintiff during a certain period. It was agreed that this rebate or discount should be paid to the defendant at the end of the year next succeeding the period above mentioned, on condition that for the remainder of the previous year and during the whole of the next year the
41 defendant should have purchased the commodity exclusively from the plaintiff. It was averred, in the answer, that under the working of this system of contracts, each purchaser was placed and kept in a situation whereby, if any competing firm entered into the business, the purchaser, by dealing with such competing firm, would sacrifice a large rebate on the last year's purchases of goods. It was further averred that the entire system of contracts was designed for the purpose of preventing competition, and did in fact prevent competition. It was further averred that the prices charged by the plaintiff were unreasonable, and that each order for goods bought by the defendant contained a clause reciting that the goods were for consumption by

the defendant only, and not for resale. It was further averred that the original combination, the series of contracts referred to in the answer, the stipulation against resale, and the individual sales, all constituted elements of a general plan or design, which in its entirety constituted a combination or conspiracy intended and having the effect to restrain and monopolize interstate trade and commerce, in violation of the Sherman anti-trust act of July 2, 1890; and that the account upon which the suit was brought was made up, in the knowledge of both the defendant and the plaintiff, with direct reference to the agreement heretofore referred to. Held,
42 that the facts set forth in the answer constituted no defense to the action, and that the answer was properly stricken, on motion in the nature of a general demurrer. The case of Continental Wall Paper Co. v. Voight, 212 U. S. 227, is distinguishable from the present case, which falls within the principle announced in Connolly v. Union Sewer Pipe Co., 184 U. S. 539.

RUSSELL, *J.*, dissenting:

I think the case is fully controlled by the ruling of the Supreme Court of the United States in the case of Continental Wall Paper Co. v. Voight, supra, and that the court erred in striking the defendant's answer.

The Corn Products Refining Company brought its action against the D. R. Wilder Manufacturing Company upon an open account for goods sold and delivered. The defendant filed an answer, admitting the purchase of the goods at the price stated in the account, but set up the following defense: "The defendant further shows to the court that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, being a corporation formed by the consolidation of the Glucose Refining Co., the American Glucose Co., the United States Sugar Refining Co., The Pope
43 Glucose Co., the Illinois Sugar Refining Co., the National Starch Co., the United Starch Co., the Corn Products Co., the Warner Sugar Refining Co., the St. Louis Syrup & Preserving Co., the New York Glucose Co., and many other firms and corporations which, before the formation of the plaintiff company, were independent and competing manufacturing concerns, manufacturing and selling goods of the kind sued for in the plaintiff's complaint. Said combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the plaintiff, and did result in a monopoly of interstate trade, and in greatly advancing the price at which said commodities were sold, and constituted a combination or conspiracy in violation of the Federal statute. Shortly after said combination was effectuated, and while the plaintiff controlled an absolute monopoly of the glucose and grape sugar industry, the plaintiff inaugurated a system of contracts with its purchasers, which it referred to as its 'profit-sharing plan.' Under said system of contracts it agreed to give to its purchasers a rebate of some certain amount per hundred pounds upon all purchases of glucose or grape sugar during any years, provided and

upon the condition that the said purchaser, during the following year, gave to the said Corn Products Refining Co. its exclusive patronage. All of said contracts were substantially similar,
44 except that the amount of the rebate varied from year to year.

The defendant attaches hereto, as Exhibit 'A,' a copy of the contract relative to the rebate on its 1906 business, under which it was agreed to give the defendant a rebate of 10 cents per hundred pounds on all shipments of glucose purchased by it from the plaintiff during 1906, provided it gave to the plaintiff its exclusive trade during the year 1907. A substantially similar contract was entered into relative to trades in 1907, and relative to trades in 1908 and 1909, with this difference relative to the two latter years, viz., that the rebate was advanced from 10 cents to 15 cents per hundred pounds. The defendant alleges that substantially similar contracts were given to practically all consumers of glucose and grape sugar in the United States. The defendant alleges that at the time said so-called profit-sharing plan was originated, the plaintiff was the sole firm or corporation in the United States manufacturing and selling glucose and grape sugar, having absorbed all independent and competing concerns, and this defendant and the other manufacturing plants which consumed glucose or grape sugar in the United States were forced to purchase from the plaintiff upon whatever terms could be made, a part of which terms are embraced in this so-called profit sharing plan.

"Under the working of said system of contracts each
45 purchaser of glucose or grape sugar was placed and kept in a situation whereby, if any independent or competing firm or corporation entered into the business of manufacturing or selling glucose or grape sugar, such purchaser, by dealing with such independent or competing firm, would sacrifice a large rebate on the previous year's business by giving his trade to such independent or competing concern. The entire system of contracts herein outlined, and the contracts hereinafter referred to, were designed for the purpose of preventing competition from arising in the business which had previously been monopolized by the plaintiff company, and did, in fact, have such effect to a large extent. Defendant alleges that the plaintiff advanced the price of glucose and grape sugar to such exorbitant extent that a few independent concerns have been created and are now attempting to compete with the plaintiff, and are offering lower prices than those asked by the plaintiff, but are having great difficulty in doing so, because of the fact that the plaintiff has heretofore obtained a hold upon so large a part of the consumers, through the working of the system of contracts heretofore described as the so-called profit-sharing plan. The plaintiff is claiming that any consumer who now trades with the said independent concerns forfeits to the plaintiff the rebate on the 1908 business, and is thereby coercing a large number of consumers into buying
46 from the plaintiff at its advanced prices. The defendant alleges that the prices charged by the plaintiff, even after deducting the rebates, are in excess of the prices charged by the independent firms that are now attempting to compete with the plain-

tiff, and the prices heretofore charged for glucose and grape sugar prior to organization of the plaintiff company, but that the immediate sacrifice claimed by the plaintiff against any consumer who trades with independent concerns as heretofore described is so great, and so many consumers are uncertain that said independent concerns will continue to do business, that the plaintiff is able to control and coerce a large part of the trade, and still controls a partial monopoly of the trade.

"The defendant shows that each purchase made by it, and by other purchasers, from the Corn Products Refining Co. contained the following clause in the contract of purchase: 'The goods herein sold are for your own consumption only, and not for resale.' The defendant shows that the sales for the purchase price of which suit is brought were made under the system of contracts herein outlined. The defendant shows that the original combination, the series of contracts known as the profit-sharing plan, the provision heretofore referred to in the contracts of sale, and the individual sales, all constituted elements of one general plan or design, which in its
47 entirety constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal anti-trust act of July 2, 1890. The defendant alleges that the account on which suit is brought was made up, within the knowledge of both it and the plaintiff, with direct reference to and in execution of the agreement heretofore referred to, and that there cannot be a recovery upon said account. Defendant avers that under its contract with the plaintiff for 1908, the plaintiff agreed to allow the defendant a rebate of 15 cents per hundred pounds on all purchases of glucose and grape sugar during the year 1908 upon the conditions heretofore set out. The defendant avers that 15 cents per hundred pounds upon all of its purchases for 1908 amounts to the sum of $1,797.01. The defendant alleges that the limitation or condition in said contract that it should trade only with the plaintiff, is illegal, being in restraint of interstate trade in violation of the Federal anti-trust act as heretofore alleged, and is, therefore, not binding upon this defendant, and that this defendant is entitled to said amount notwithstanding its failure to comply with said condition. The defendant therefore prays that said amount be allowed as a counter-claim against the plaintiff and that it may have judgment for said amount."

48 The contract between the parties, evidencing what is termed in the answer the "profit-sharing plan," was in the form of a letter as follows (addressed to the defendant company and signed by the plaintiffs): "This company, recognizing the fact that its own prosperity, in a great measure, is interwoven with the good-will and co-operation of its patrons, has decided to adopt a liberal plan of profit-sharing with you, in case you shall in the future continue to give us your exclusive patronage. This company inaugurates such a policy of profit-sharing, by announcing that it will set aside, out of its profits from the manufacture and sale of glucose and grape sugar for the last six months of 1906, an amount equal to 10 cents per hundred pounds on all shipments of glucose and grape sugar

(Warner's Anhydre and Bread Sugar excepted) which shall have been made to you by this company from July 1st to December 31, 1906. This amount will be paid to you or your successors on December 31, 1907, on condition that for the remainder of the year 1906 and the entire year 1907 you or your successors shall have purchased exclusively from this company or its successors all the glucose and grape sugar required for use in your establishment. With the assurance of steadfast co-operation of its customers, given in reciprocation for the benefits conferred upon them, this company confidently anticipates a continuance of such profit-sharing dis-
49 tribution annually to the full extent that its earnings may warrant."

The plaintiff moved to strike the answer, and the motion was sustained. The opinion of the trial judge was thus expressed in his order: "This motion is sustained and the defendant's plea is stricken. The defendant never having made any contract to buy exclusively from the plaintiff, this case does not, in my opinion, come within the decision in the case of Continental Wall Paper Co. v. Voight, 212 U. S. 227." The defendant excepted.

POTTLE, *J.*:

We do not find it necessary to discuss at any great length the question whether, conceding the facts alleged in the answer to be true, the plaintiff is an unlawful combination within the meaning of the Federal anti-trust act. The answer was clearly subject to special demurrer. The allegation that the plaintiff is an unlawful combination and conspiracy in restraint of interstate trade, and was formed for the purpose of monopolizing and restraining trade, is clearly a conclusion of the pleader, and no sufficient facts seem to be alleged to support this conclusion and bring the case within the recent de-
50 cisions of the Supreme Court of the United States in Standard Oil Co. v. United States, 221 U. S. 1 (55 L. ed. 619, 31 Sup. Ct. 502, 34 L. R. A. (N. S.) 834), and United States v. American Tobacco Co., 221 U. S. 106 (55 L. ed. 663, 31 Sup. Ct. 632). But, in view of the fact that there was no special demurrer to the answer, but only a general motion to strike made at the trial term, it may be that, under the practice prevailing in this State, the general averment that the plaintiff corporation was under an unlawful combination and conspiracy in restraint of interstate trade, formed for the purpose of monopolizing such trade, and did in fact result in a monopoly of interstate trade and in greatly advancing the price at which the commodities controlled by the plaintiff were sold, *are* sufficient to show that the plaintiff is an illegal combination, under the Federal anti-trust act. However, as stated above, we made no express ruling on this question.

For the purposes of this case we may concede that the plaintiff is such an illegal combination and conspiracy in restraint of interstate trade as that it would be subject to the penalties imposed by the Sherman anti-trust act. It by no means follows, however, that the defendant can avoid paying for the goods sold by the plaintiff and

consumed by the defendant. In the case of Connolly v. Union Sewer Pipe Co., 184 U. S. 540 (46 L. ed. 679, 22 Sup. Ct. 431), it
51 was expressly ruled by the Supreme Court of the United States that a violation of the Sherman anti-trust act by a combination in restraint of trade, by which a penalty is incurred under the statute, does not prevent the company from recovering under a contract for the purchase price of goods. Mr. Justice Harlan delivered the opinion of the court in that case, saying, among other things, "If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property it acquired or which came into its possession for the purpose of being sold,—such property not being at the time in the course of transportation from one State to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress, for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So
52 that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid."

The plaintiff in error relies upon the decision of the Supreme Court of the United States in Continental Wall Paper Co. v. Voight, 212 U. S. 226 (53 L. ed. 486, 29 Sup. Ct. 280). In that case the Continental Wall Paper Company brought suit upon an open account to recover the agreed price of goods sold to the defendant. The defense relied upon was that the plaintiff was an unlawful combination and conspiracy in restraint of interstate trade, in violation of the Sherman anti-trust act, and facts are set forth in great detail in support of this allegation. It appeared that the plaintiff was a combination of a number of smaller companies which had been engaged in the manufacture and sale of wall paper, and that these several companies entered into a written agreement with the Continental Wall Paper Company which the Supreme Court construed to constitute a conspiracy to restrain interstate trade and form a monopoly for the purpose of controlling the manufacture
53 and sale of wall paper, in violation of the anti-trust act. It appeared that it was part of the agreement actually entered into between these various companies that all jobbers and other wholesalers of wall paper should be forced to sign an agreement

binding themselves to purchase their entire stock of wall paper, nominally, either from the plaintiff or from the corporations or firms which had combined to form the large corporation, at the prices fixed by the combination, and that the jobbers and wholesalers should sell only at prices fixed by the seller, under penalty, which the combination of all of the corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of a refusal to accede to the terms so imposed, or in case of a violation thereof, should be unable to buy wall paper, should be driven out of business, and should sacrifice the good will and capital therein invested. It further appeared that the defendant and every other purchaser of wall paper from the combination or from any one of its constituent companies was required to enter into a written agreement, the substantial terms of which were as follows: The company agreed to sell subject to such credit limitation as it might impose, and the jobber agreed to purchase the entire stock required in his business of selling wall paper, to the amount of a certain gross value, without discounts, the jobber reserving to himself the right to pur-
54 chase such merchandise as he might need in excess of this amount from others. The jobber was allowed certain discounts at rates shown in a schedule accompanying the agreement and made a part thereof. Attached to the agreement was a schedule of "road" prices at which the company agreed to sell its goods for the term embraced in the contract to dealers other than jobbers, and also a statement of discounts allowed to such customers, other than jobbers, for quantity purchases, together with the terms of credit and freight allowance to which such customers were entitled. The agreement further provided: "It is an essential condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms that those shown in schedule 'B,' the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company." The prompt performance by the jobber of all the terms of the agreement was made a condition precedent to the exaction of the continuous performance of the agreement by the company. With each order for goods the purchaser was required to sign an agreement "not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful
55 performance of this agreement is a condition precedent to the filing of our order. The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts."

The view of the Supreme Court in that case may best be gathered from the following excerpts from the opinion of the majority, written by Mr. Justice Harlan: "The present case is plainly distinguishable from the Connolly case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing

whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor part of nor in execution of any general plan or scheme that the law condemned. The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to
56 the property, was precluded by reason alone of its illegal character from having a judgment against the purchaser. We held that the defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress. The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme. We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up in execution of the agreements that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several States. The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and pursuant to which the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall
57 Paper Company was organized. If judgment be given for the plaintiff, the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground merely that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made up, with the knowledge of both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combina-

tion, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment
58 cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay." The present Chief Justice and Justices Holmes, Brewer, and Peckham dissented, being of the opinion that the case fell within the principle of the decision in Connolly v. Union Sewer Pipe Company; Mr. Justice Brewer being also of the opinion that the defense was not well founded for the additional reason that where a statute created a new offense and denounced the penalty, or gave a new right and declared the remedy, the punishment or the remedy could be only that which the statute prescribed. His view as to this point was thus tersely expressed: "Now, the remedies given in the anti-trust act are three in number: First, a criminal prosecution; second a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These, being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint
59 and secure criminal proceedings. There was no property to be forfeited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased."

This court yields ready assent to any decision of the Supreme Court of the United States involving the construction and effect of a Federal statute. We will give to the decision of that court in the case last mentioned above full scope and effect, but at the same time we cannot bring our minds to agree to the opinion of the majority in that case. On the contrary, we believe that the opinion expressed by the dissenting Justices is the sounder and better view of the law. The Federal courts have exclusive power to decree illegal a combination formed in violation of the anti-trust act. The illegality of such a combination should be determined by a direct proceeding brought for that purpose in the Federal court, in accordance with the procedure and practice in that court, where the corporation assailed has full opportunity to be heard. It ought not to be open to collateral attack in every minor State court where it may bring an action to enforce one of its contracts of sale. In view of the opinion of the Supreme Court of the United States in the Standard Oil Company and American Tobacco Company cases, it is very doubtful whether

that court as now constituted will follow this decision. In the Standard Oil Company case the court, in construing the Sherman act, expressed the following view: "The statute under this
60 view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference,—that is, undue restraint. * * * Thus not specifying, but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided." Under this decision the question of the illegality of the combination under the anti-trust act becomes a mixed question of law and fact. It involves a consideration of the details of the business of the alleged unlawful combination, the purposes for which it was formed, the manner in which its business is conducted, and more frequently involves a consideration of complicated facts which ought not to be considered by a jury in a State court, impaneled only to try the question whether a purchaser of goods from a combination should pay for the goods which he has bought and consumed. Suppose, for instance, that the jury impaneled in the case now for decision should determine that
61 the plaintiff is an illegal combination and conspiracy, and that the contract of sale sued on was illegal and void. Another jury, impaneled to pass upon exactly the same issue, in a suit of exactly the same kind might reach an exactly opposite conclusion. Thus, the plaintiff would be in a helpless condition, with its very business life in the balance and compelled to try the issue of its right to exist before every jury impaneled to try the question of its right to recover for goods which it has sold and delivered. We do not believe this to be the law, and we are of the opinion that every consideration of sound policy, and the settled principle of law compel a contrary conclusion. But let us see what the scope and effect of the decision in the case of Continental Wall Paper Co. v. Voight is, and then determine whether the decision reached by the majority of the court in that case compels us to hold that the facts set forth in the defendant's answer in the present case show that the contract sued on is illegal and incapable of enforcement.

In the Continental Wall Paper Company case the defendants were virtually compelled to sign a jobber's agreement which in effect bound them to buy from the plaintiff all the wall paper needed in their business, at certain fixed prices, and not to sell at lower prices or upon better terms than those upon which the plaintiff itself sold to dealers other than jobbers. It appeared that the prices thus agreed on were unreasonable; that the plaintiff had practi-
62 cally a monopoly of the manufacture and sale of wall paper, and that the account was made up, "within the knowledge of

both buyer and seller, with direct reference to and in execution of the agreements which constituted the illegal combination." The court held, in effect, that the defendants in that case were particeps criminis; that, by their contracts they became a part of the illegal combination and conspiracy; that they entered into these contracts for the purpose of furthering the conspiracy; that they knowingly and intentionally became parties to an agreement executed in violation of the anti-trust law. There is no such situation in the case now in hand, and it is clearly distinguishable from that case. The contract between the plaintiff and the defendant in the present case contains but one feature which differentiates it from the ordinary contract of sale. This feature is called the "profit-sharing plan." It is simply nothing more nor less than an agreement on the part of the seller to divide its profit with the purchaser, provided the purchaser will give to the seller his exclusive trade. We do not see how there can be any legal objection to a contract of this nature. Certainly it is not illegal to allow the purchaser a rebate upon the purchase-price on condition that he give the seller his exclusive business. See In re Corning, 51 Fed. 205; In re Greene, 52 Fed. 105 (7).

63 We see no objection from a legal standpoint to a manufacturer of goods offering an inducement of this sort in order to build up his business and secure the exclusive trade of a purchaser. The purchaser is not compelled to buy, and, if he buys, he does so either because he obtains better terms or because he cannot get the character of goods he desires elsewhere. If he violates his agreement and fails to obtain a rebate or discount, he simply pays for the goods what everybody else does who enters into a similar arrangement. While the great object of the Sherman act was undoubtedly to encourage competition, it never was designed to prevent the execution of legitimate contracts made to increase the business of a manufacturer. Indeed, it is very clear, from the latest expressions of opinion by the Supreme Court of the United States, that even though a manufacturer should, by the application of legitimate business methods, secure practically the exclusive sale of a commodity, this alone would not make it obnoxious to the anti-trust act. Certain it is, therefore, that this contract, made with this defendant, standing alone, is not illegal under any principle of law to which we have been referred.

Nor do we think there is anything in the answer which makes the contract illegal. It is alleged that at the time this system of profit-sharing contracts was inaugurated, the plaintiff was the sole

64 corporation in the United States manufacturing glucose and grape sugar, having absorbed all independent and competing concerns. As we have seen, this allegation does not make the contract illegal. It is further averred that the defendants were forced to purchase from the plaintiff glucose or grape sugar upon whatever terms could be made. This allegation does not help the defendant's case. As we have said above, the mere fact that the plaintiff was the exclusive manufacturer of this commodity, and that the defendants were for this reason forced to purchase from the plaintiff, would not

render the contract illegal. The main contention of the defendant seems to be that it was compelled to purchase from the plaintiff for each succeeding year, under penalty of losing the discount allowed under the contract on purchases of the previous year, and that under this system the plaintiff was enabled to maintain a monopoly of the business. We do not understand how this kind of contractual compulsion is obnoxious to the anti-trust act. At the expiration of any contract the defendants were free not to enter into another; they were free not to make further purchases from the plaintiff, and the fact that their refusal to make further purchases simply entailed a loss of the discount, offered upon condition that they would make further purchases, does not render the contract illegal. It is alleged generally in the answer that these contracts were de-
65 signed for the purpose of preventing competition and did in fact have such an effect. Suppose they did. If their terms were legitimate, and there is nothing in the contracts which would make them illegal, the fact that they may have resulted in building up the plaintiff's business to such an extent as to enable it to practically control the sale of the commodity would not render the contracts unenforceable. Indeed, the answer of the defendant in this very case shows that competition has arisen, and that the defendant can purchase the commodity from other concerns, but the defendant alleges it cannot do so, because it would forfeit the discount for the period of one year allowed by the plaintiff. The defendant is at perfect liberty to purchase from these other concerns, and the presumption is that if it does not do so, it is because it can secure more favorable terms from the plaintiff. The contracts of the plaintiff in this case may have the effect of lessening or even destroying competition, but if the methods employed to bring this about are legitimate and not obnoxious to the law, the contracts are not subject to be set aside.

It is further alleged in the answer that each order for goods bought by the defendant contained a clause reciting that the goods are sold "for your own consumption only, and not for resale." A covenant by the buyer of property not to use the same in com-
66 petition with the business retained by the seller has been held to be valid. United States v. Addyston Pipe & Steel Co., 85 Fed. 271, citing Hitchcock v. Anthony, 83 Fed. 799, and American Strawboard Co. v. Holderman Paper Co., 83 Fed. 619. If not valid, it is incapable of enforcement, and does not restrain the purchaser from reselling the goods at his pleasure. Moreover, there is another very clear distinction between this case and the Continental Wall Paper Company case. In that case written agreements between the combining corporations and firms were executed, and showed as clear a case of conspiracy to restrain interstate trade as it would be possible to conceive. And the Supreme Court of the United States held that the contract of sale in that case was made with direct reference to and in execution of the agreements which constituted the illegal combination. No such agreements are alleged in the present case. It is simply averred that the plaintiff was made up by a combination

of a number of manufacturers which were independent competing concerns, and was formed for the purpose of monopolizing and restraining interstate trade. The answer does not set forth any conspiracy agreement, nor does it appear that there was in fact any conspiracy among these constituent companies to restrain interstate trade. But even if such illegal agreements had been entered into by the companies which combined to form the plaintiff corporation, the defendant was no party to such an arrangement; it took part
67 in no conspiracy to restrain interstate trade, and there is nothing in the contract of sale executed by it which shows that it was made for the purpose and as a part of an unlawful conspiracy to restrain interstate trade or commerce. We are quite clear that the trial judge committed no error in striking the defendant's answer in the present case, upon the ground that it set forth no defense to the action. The answer having admitted the purchase of the goods at the price stated in the contract, it was properly stricken and judgment entered in behalf of the plaintiff for the full amount sued for.

Judgment affirmed.

Russell, J., dissents.

68 Court of Appeals of the State of Georgia.

ATLANTA, *October* 2, 1912.

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

D. R. WILDER MANUFACTURING CO.
v.
CORN PRODUCTS REFINING CO.

This case came before this court upon a writ of error from the city court of Atlanta; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed.

Russell, J. dissents.

Bill of costs, $10.00.

69 Court of Appeals of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *November* 29, 1912.

I hereby certify that the foregoing pages hereto attached contain the original writ of error and citation, together with a true and complete transcript of those parts of the record in the case of D. R. Wilder Manufacturing Company v. Corn Products Refining Company which are required by the præcipe of the plaintiff in error to be sent to the Supreme Court of the United States, as appears from the records and files of this office.

Witness my signature and the seal of the Court of Appeals of Georgia hereto affixed, the day and year above written.

[Seal Court of Appeals of the State of Georgia, 1906.]

LOGAN BLECKLEY, *Clerk.*

Endorsed on cover: File No. 23,450. Georgia Court of Appeals. Term No. 392. D. R. Wilder Manufacturing Company, plaintiff in error, vs. Corn Products Refining Company. Filed December 9th, 1912. File No. 23,450.

Supreme Court of the United States

OCTOBER TERM, 1913

No. 71

D. E. WILSON MANUFACTURING COMPANY,

Plaintiff in Error

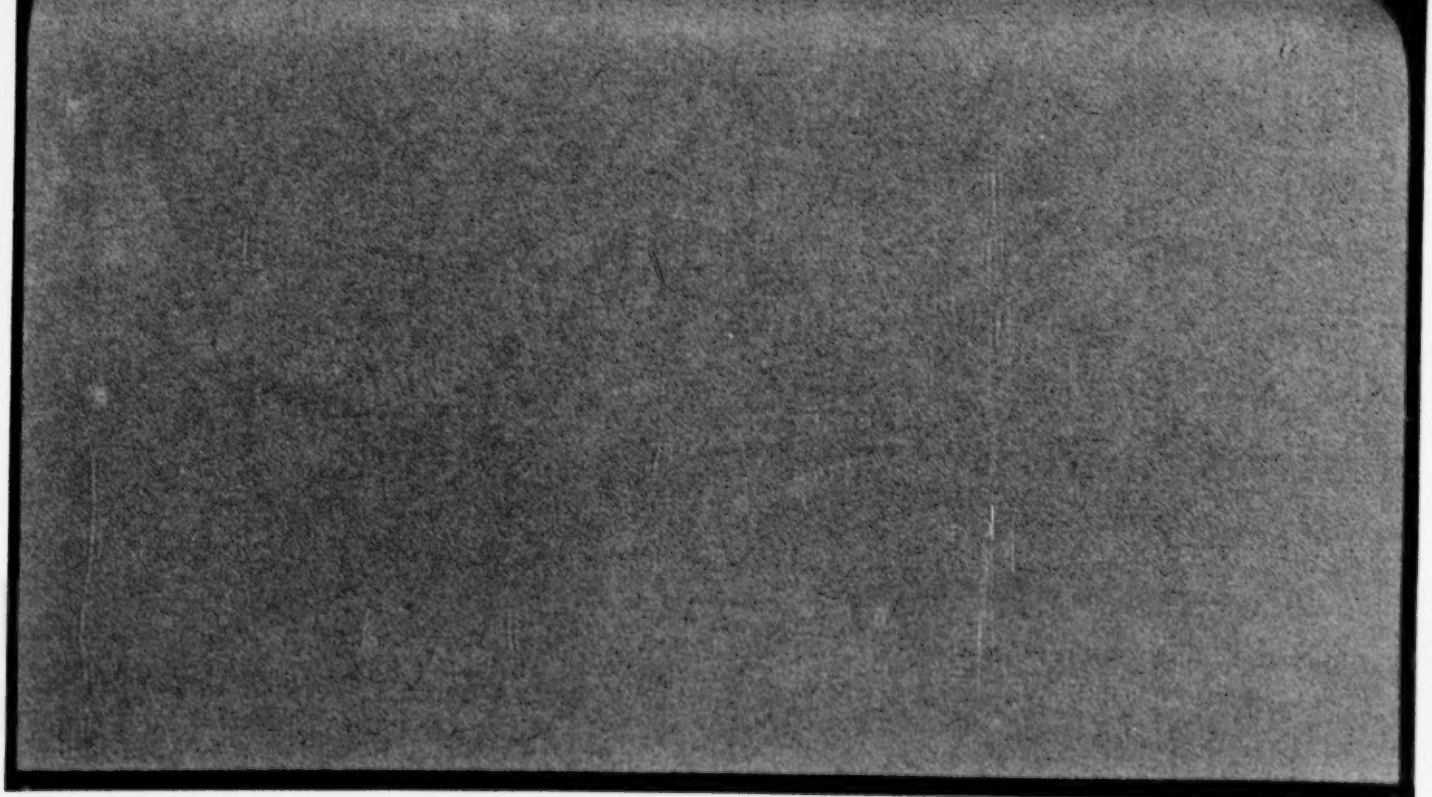
vs.

CORN PRODUCTS REFINING COMPANY,

Defendant in Error

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

(23,450)



IN THE SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1913.
No. 392.

D. R. WILDER MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,
vs.
CORN PRODUCTS REFINING COMPANY,
DEFENDANT IN ERROR.

INDEX.

TABLE OF CASES.

STATEMENT OF CASE.

The Corn Products Refining Company brought suit against the D. R. Wilder Manufacturing Company in the City Court of Atlanta upon an open account to recover the purchase price of certain shipments of glucose.

The plaintiff in error filed its answer, in which it admitted the purchases at the price alleged, and plead that the purchase price could not be collected because the purchases were based and were intended by the parties to be based upon agreements which were essential parts of an illegal scheme under the Act of Congress of July 2, 1890, commonly referred to as the Sherman Act.

The defendant in error filed a motion in the nature of a general demurrer to strike the answer as setting out no legal defence, which motion was sustained and a verdict and judgment rendered against the defendant.

On writ of error the Court of Appeals of Georgia affirmed the judgment of the City Court by a divided bench, two of the Judges voting for the affirmance and the third Judge dissenting. (Wilder Manufacturing Company vs. Corn Products Refining Company, 11 Ga. App., 588.) The case, therefore, presents squarely the question of whether the allegations of the answer, if true, are sufficient to constitute a legal defence to the suit under the Act of Congress above referred to.

The defence set out by the answer is briefly as follows:

The defendant in error is a corporation formed by combining certain specified firms, persons and corporations and many others for the purpose and with the effect of creating a monopoly in the manufacture and sale in interstate commerce of glucose and grape sugar, in violation of the Federal Statute. Prior to this merger resulting in the Corn Products Refining Company, the firms, persons and corporations which later went

into the merger had been conducting independent and competing businesses. As a result of the merger such competition was killed, and it became necessary for the plaintiff in error and all other manufacturers consuming glucose to purchase such glucose from the Corn Products Refining Company.

Having thus established itself as practically a complete monopoly, the defendant in error devised and put into effect a certain scheme for perpetuating its illegal monopoly in interstate commerce. This scheme is referred to in the answer as "The Profit Sharing Plan," and consists of a series of contracts entered into between the defendant in error and the consumers of its products, including the plaintiff in error in this case.

These profit sharing contracts were renewed from year to year each being substantially the same. The character of the contracts may be shown by stating the contract between the parties to this case for the year 1906. At the beginning of this year the defendant in error agreed to give the plaintiff in error a certain rebate on all goods purchased by the plaintiff in error from the defendant in error during the year 1906 upon certain conditions, namely, that the plaintiff in error would purchase no glucose from any one but the defendant in error during the year 1906 and during the year 1907. At the end of 1906 the amount of this rebate was credited to the plaintiff in error's account, and the plaintiff in error was advised of the amount of the rebate, but the rebate was not payable until the end of the year 1907 and was payable then only in the event that during all of 1907 the plaintiff in error had given to the defendant in error its exclusive patronage.

At the commencement of the year 1907 a similar contract was entered into with reference to 1907's business, the rebate for which would be credited at the end of 1907, but not payable until the end of 1908, and payable then only in the event the plaintiff in error traded with no one but the defendant in error.

It is specifically alleged in the answer that all sales from the defendant in error to the plaintiff in error were made under these general contracts governing sales between the par-

ties, giving to the plaintiff in error this rebate upon the conditions specified. It is specifically alleged that all sales including those on which suit is brought were made with direct reference to these profit sharing contracts, and were therefore a part of such contracts.

It is alleged that the profit sharing contracts were entered into with practically all consumers of glucose and were for the purpose and actually had the effect of perpetrating the illegal monopoly, which was the fundamental purpose in the formation of the defendant in error.

It is alleged that the defendant in error after establishing its monopoly raised its prices to such an extreme extent that finally shortly before the suit was filed, some slight competition had sprung up.

To further effectuate its illegal monopoly the defendant in error inserted in each invoice, including the invoices for the goods on which suit is brought, the agreement that the goods were sold for the consumption of the purchaser only, and not for re-sale. This provision it is alleged appears in all invoices both to the plaintiff in error and to all other consumers of glucose.

It is alleged that the original combination, the series of contracts known as "The Profit Sharing Plan," the provisions above referred to in the contracts of sale, and the individual sales, including the one on which suit is brought, all constitute elements of one general plan or design, and that this general plan in its entirety constitutes a combination or conspiracy intended and having the effect directly to restrain and monopolize interstate trade and commerce in violation of the Federal Anti-Trust Act of July 2, 1890.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors specifies the fundamental error in the following ways:

—1—

The Court of Appeals erred in sustaining the City Court of Atlanta in holding that the defendant's answer did not set out a good and complete defence, it appearing from said answer that the sales for which suit was brought were directly connected with and a part of certain contracts which were illegal and void and unenforceable under the Act of Congress approved July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies."

—2—

The Court of Appeals erred in holding that the contracts under which the sales sued for were made were not, under the allegations of the answer, illegal and void and unenforceable under the aforesaid Act of Congress.

—3—

The Court of Appeals erred in holding that under the allegations of the answer a recovery could be had upon the account sued on, it appearing from the said answer that the plaintiff in the City Court of Atlanta was an illegal combination intended and having the effect directly to restrain and monopolize trade and commerce in violation of the aforesaid Act of Congress, and that the account was made up within the knowledge of above parties with direct reference to, and in execution of contracts which had for their object and which had directly the effect to accomplish the illegal ends for which the plaintiff was organized.

—4—

Because the Court of Appeals erred in holding that the City Court of Atlanta did not err in striking the answer of the defendant and in giving judgment for plaintiff because the City Court of Atlanta erred in holding that the contracts between the parties shown by the answer with reference to which and in execution of which the account sued on was made up were not illegal and void, under the aforesaid Act of Congress.

—5—

The said Court of Appeals erred in sustaining the City Court of Atlanta in striking the answer of the plaintiff in error, and in holding that the said answer did not constitute a good and sufficient defence to the plaintiff's suit under the aforesaid Act of Congress approved July 2, 1890.

—6—

The Court of Appeals erred in rendering the aforesaid judgment in that the same is repugnant to and in conflict with the laws of the United States, and especially the aforesaid Act of Congress approved July 2, 1890.

—7—

The Court of Appeals erred in construing the aforesaid Act of Congress as not rendering illegal and void the contract between the parties under which the sales sued on were made, and as not rendering illegal and void and unenforceable the said sales under the said contract.

BRIEF.

The allegations of the answer show the defendant in error to be a combination in restraint of interstate trade in violation of the Federal Statute, it appearing that the combination merged into one corporation various firms and corporations which previously had been competitors, and that the combination was for the purpose and with the effect of restraining and monopolizing such interstate trade. The creation of a monopoly is sufficient to make the restraint unreasonable.

American Tobacco Co. vs. United States, 221 U. S., 106;

Standard Oil Co. vs. United States, 221 U. S., 1.

The corporate organization of the defendant in error can not be used as a cloak to cover the fact that it constitutes an illegal combination.

Northern Securities Co. vs. United States, 193 U. S., 197;

American Tobacco Co. vs. United States, supra;

Standard Oil Co. vs. United States, supra.

The general allegation that the defendant in error is an illegal combination is treated by the Court of Appeals of Georgia as sufficient under the Georgia practice as against a motion in the nature of a general demurrer, although no express ruling as this point was considered necessary, as the Court placed its decision on other grounds.

Wilder Manufacturing Co. vs. Corn Products Refining Co., 11 Ga. App., 588.

A recovery can not be had upon an account for goods sold and delivered by such illegal combination when the goods were sold with direct reference to and in execution of agreements which had for their object and which had directly as their effect the accomplishment of the illegal ends for which the combination was organized.

Continental Wall Paper Co. vs. Louis Voight & Sons Co., 212 U. S., 227.

It is not necessary to show that the contracts under which the goods were sold are expressly violative of the Federal Statute. The illegal intent with which the contracts were made is sufficient to make illegal contracts which appear on their face as no more than ordinary acts of competition.

Nash vs. United States, 229 U. S., 373;

Swift & Co. vs. United States, 196 U. S., 375;

Loewe vs. Lawlor, 208 United States, 274.

A contract of purchase by an illegal combination which together with other similar contracts tends to create a monopoly is void and unenforceable even though the other party to the contract is ignorant of its purpose in this respect.

Brent vs. Gay, 149 Ky., 615; 149 S. W., 915; 41 L. R. A., (N. S.), 1034.

A contract, which though apparently harmless in itself, is in reality a part of a general scheme to violate statutes against the restraint of trade will be held to be illegal.

Continental Wall Paper Co. vs. Louis Voight & Sons Co., supra;

Cravens vs. Carter, Crume & Co., 92 Fed., 479;

Pacific Factor Co. vs. Adler, 90 Cal., 110; 25 Am. St. Rep., 102; 27 Pac., 36;

Fink vs. Schneider Granite Co., 187 Mo., 244; 86 S. W., 213;

Detroit Salt Co. vs. National Salt Co., 134 Mich., 120; 96 N. W., 1.

A contract is illegal where, though harmless on its face, it is one of many similar contracts which collectively have the direct effect of aiding an illegal purpose of restraining interstate trade.

United Shoe Machinery Co. vs. LaChapelle, 212 Mass., 467; 99 N. E., 289.

The scheme must be treated as an entirety.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211;

Swift & Co. vs. United States, 196 U. S., 375;

Montague & Co. vs. Lowry, 193 U. S., 38;

Loewe vs. Lawlor, 208 U. S., 274.

Illegality may consist in the purpose to accomplish an illegal result though the methods used are not inherently unlawful.

Hanauer vs. Doane, 12 Wall, 342;

Kohn vs. Melcher, 43 Fed., 641;

Mogul Steamship Co. vs. McGregor, L. R., 61; Q. B. Div., 285; [1892] A. C., 25;

Clark on Contracts, 478 et seq.

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect.

Hall vs. Coppell, 7 Wall., 542;

Armstrong vs. Toler, 11 Wheat., 258;

Embrey vs. Jemison, 131 U. S., 336.

One of the parties can not maintain an action on the valid part of the contract discarding or omitting to prove the portion that is illegal.

McMullin vs. Hoffman, 174 U. S., 639.

The Continental Wall Paper Co. case is authority for the proposition that when the sales are made under and with reference to an illegal agreement, and the plaintiff sues on the sales, the defendant may thereupon plead the illegal agreement of which the sales are a part.

See also:

Oscanyan vs. Winchester Repeating Arms Co., 13 Otto, 261.

The cases relied upon by the defendant in error can be distinguished from the case at bar.

For example Connolly vs. Union Sewer Pipe Co., 184 U. S., 540, which is especially stressed by the defendant in error decided only that an illegal combination was not by reason alone of its illegal character prevent it from collecting for goods sold.

The Continental Wall Paper Co. case points out this difference between the Connally case and cases such as the one at bar.

The defendant in error cites authorities to prove that the agreement between the parties standing alone is not inherently illegal. It does not, however, stand alone but it shown by the answer to be one of the effective means of accomplishing the illegal purpose of the combination.

If any of the cases urged by the defendant in error go to the extent of holding that this is not sufficient to make the agreement illegal, they are in conflict with the decisions of this Court.

Nash vs. United States, 229 U. S., 373;

Swift & Co. vs. United States, 196 U. S., 375;

Loewe vs. Lawlor, 208 U. S., 274.

The case of Bank vs. Glass & Co., 169 Mo. App, 374, is not in point because (1) it did not appear that the plaintiff had established any substantial monopoly, and (2) the "commission agreement" in that case was not alleged as being a method of restraining competition, and, therefore, illegal.

The case of Bessire & Co. vs. Corn Products Manufacturing Co., 47 Ind. App., 313, is in conflict with the decisions of this Court on two points, namely, in holding that the legality of the plaintiffs' organization could only be questioned in a direct proceedings by the government, and second, in holding that where the plaintiff could make out its case without reference to illegal agreements, the defendant could not thereupon plead and prove them.

There is nothing to distinguish this case from the Continental Wall Paper Co. case, and the decision then rendered is controlling.

ARGUMENT.

The case of the Continental Wall Paper Company case vs. Louis Voight & Sons Company, 212 U. S., 227, is controlling.

The above case and the case of Connolly vs. the Union Sewer Pipe Company, 184 U. S., 540, presents the conclusions reached by this Court relative to the rights of combinations in restraint of trade with reference to the enforcement of their contracts.

The case at bar must be decided with reference to whether it falls within the rule of the Connally case, or whether it is within the rule of the Continental Wall Paper Company case. It is, therefore, essential to determine exactly what the Court held in these two controlling decisions.

In the Connolly case the defence asserted was that the plaintiff was a combination in restraint of trade. It did not appear that the sales on which suit was brought were in any way connected with the illegal organization or with the illegal purpose of the Union Sewer Pipe Company. In discussing the case, Mr. Justice Harlan in the Continental Wall Paper Company case says: "His contract was to take certain goods at an agreed price, and was not in itself illegal, nor *a part of, nor in execution of any general plan or scheme that the law condemns.*" The italics is by the Court.

In the Continental Wall Paper Company case the majority opinion states what was ruled in the Connolly case as follows: "In short the defence in the Connolly case was that the plaintiff corporation, although owning the pipe in question, and having authority to sell and pass title to the property, was prohibited by reason **alone** of its illegal character from having a judgment against the purchaser. We held that that defence could not be sustained, either upon the principles of common law, or under the Anti-Trust Act of Congress."

The Continental Wall Paper Company case also presents a case of a combination in restraint of trade seeking to enforce the collection of the purchase price of goods sold. If that had been the only fact presented by the defence, it would clearly have been within the ruling in the Connolly case. Another element entered into the situation presented by this latter case, namely, that there was a direct connection between the sales sued on, and the illegal ends for which the plaintiff was formed. It was this connection which in the opinion of this Court distinguished the two cases, and prevented a recovery of the purchase price of the goods by the Continental Wall Paper Company, whereas in the Connolly case a recovery had been allowed.

In holding that a contract directly connected with an illegal scheme could not be enforced, this Court announced no novel principle of law. The same doctrine had been applied in Hanauer vs. Doane, 12 Wall., 342; McMullen vs. Hoffman, 174 U. S., 639; Coppell vs. Hall, 7 Wall., 542; Embrey vs. Jemison, 131 U. S., 336; and in other cases, and is old in American and English Law.

The vitally important point ruled in the Continental Wall Paper Company case is found in the consideration of the facts which were held to be sufficient to establish a direct connection between the sales and the illegal purpose of the combination.

Analyzing the facts of that case, it appears that while the defendants are spoken of as members of the combination, they were not members as sellers, but were members as buyers. They were not in any sense beneficiaries of the illegal combination, but were rather sufferers from it. In their relations to the combination, they were always in the attitude of buyers, and the combination in the attitude of seller. The statement in the opinion, therefore, that Louis Voight & Sons Company were members of the combination is to be understood in connection with these facts as its explanation.

There was, however, a connection, otherwise the case would have been decided on authority of the Connolly case.

That connection consisted in a contract between the Continental Wall Paper Company as seller, and Voight & Sons Company as buyers, with reference to which the particular sales were executed, and which had for its purpose the accomplishment of the illegal purpose of the corporation, being similar to other contracts executed with jobbers over the country as a whole. We believe the case will be considered in vain for any other connection, and that there is no escape from the conclusion that this was held to be a sufficient connection to invalidate the sales.

It is not held in the Continental Wall Paper Company case that the connecting contract between the buyer and seller contained any provisions which expressly and on their face violated the Sherman Act. Such contracts were held to be illegal because, in the language of the Court, they "had for their object . . . . . and had directly the effect to accomplish the illegal ends for which the Continental Wall Paper Company was organized." The agreements are spoken of in another place as being contracts "by means of which the combination proposed to accomplish the forbidden ends."

We may, therefore, state the elements which were held in the Continental Wall Paper Company case to render the sales illegal as follows:

1. That the plaintiff is an illegal combination in restraint of trade.

2. That there is a contract between the parties with reference to sales, which has for its purpose and effect the accomplishment of the illegal purpose of the combination.

3. That the sales are made within the knowledge of both buyer and seller with direct reference to and in execution of the illegal agreement.

It is respectfully submitted that each of these elements clearly appears in the answer of the plaintiff in error in the case at bar.

The defendant in error is an illegal combination in restraint of interstate trade.

There can be no serious question but that the answer of the plaintiff in error sufficiently shows this proposition. It is probable that some of the allegations would have required amplification as against a special demurrer, but no special demurrer was filed, the controlling ruling of the Court being made on a motion to strike the answer, which motion is in the nature of a general demurrer.

The answer shows that the defendant in error is a corporation formed by certain named manufacturers of glucose and many others, which before the formation of the plaintiff Company were independent and competing manufacturers.

It shows that the combination was for the purpose of monopolizing and restraining interstate trade in the products handled by the defendant in error, and that it did result in a monopoly of interstate trade, and in greatly enhancing the price at which commodities were sold. The answer alleges that for a while at least, the combination was successful in its illegal purpose, to the extent that it maintained an absolute monopoly, and that it advanced the price of its products to a large extent. All of these allegations are admitted for the purpose of the motion under consideration. While a special demurrer might have required amplification in some of the statements, they are not conclusions of law, but are statements of fact, and are admitted for the purpose of the motion in the nature of a general demurrer which the Georgia Courts sustained.

It cannot be questioned, under the decisions of this Court, that these facts if true constitute the defendant in error an illegal combination in violation of the Anti-Trust Act. Either the purpose to create a monopoly or unreasonably increase prices is sufficient to render the restraint of trade unreasonable, and, therefore, illegal. The law on the subject is now so clearly established that extended discussion would be superfluous.

American Tobacco Co. vs. United States, 221 U. S., 106;

Standard Oil Co. vs. United States, 221 U. S., 1.

The so-called profit sharing contracts have for their direct purpose and effect the restraining and monopolizing of interstate commerce.

It is positively alleged in the answer that the purpose of these agreements was to effectuate the illegal purpose of the combination as to the restraint of interstate trade. It is alleged that the effect and operation of the series of contracts was to restrain and monopolize interstate trade. These are not conclusions of law, but are statements of fact, which are admitted by a motion in the nature of a general demurrer.

For the purpose of considering the ruling of the Court on this motion, we could rest the case on this proposition. It is not, however, necessary to do so. The allegations of the answer and the contracts themselves disclose the details of a very adroit and far-reaching scheme, affecting all the trade, which was well adapted to accomplish the illegal purpose alleged.

The Court will also bear in mind that the provision in each invoice that the goods covered by it were only for consumption by the purchaser and not for re-sale, was also a part of the contractural relation between the parties.

This contractural relation embodied, therefore, first, the provision that the goods should under no circumstances be resold, which has just been stated, and second, under the profit sharing contracts an elaborate scheme by which the purchaser must continue to trade exclusively with the defendant in error, or forfeit a large amount of rebates accrued on past transactions.

Let us illustrate the operation of this plan: Suppose a purchaser traded with the defendant in error during the year 1906. At the end of that year such purchaser would be cred-

ited with a large rebate on all sales made during that year. This rebate, however, would not be paid to the purchaser then, but he would be advised that it would only be paid to him at the end of the year 1907, and would be payable then only in the event that during the year 1907 also he had given to the defendant in error his exclusive trade. During the year 1907 the same process would be in operation with reference to that year's business. At the end of 1907, the purchaser, if he had continued to trade exclusively with the defendant in error, would be paid his 1906 rebate, and would be credited with his 1907 rebate, but this rebate for the latter year would be payable to him only at the end of the year 1908, and provided always that he had continued during the year 1908 to give to the defendant in error his exclusive trade. So that at all times the purchaser was placed in a position where if he gave a single order to any competitor of the defendant in error (if attempted competitors sprang up) he would instantly forfeit at least a whole year's rebate, and also that part of the current year's rebate represented by the portion of the current year which had elapsed.

The Court will bear in mind that the answer alleges that at the time this system was adopted the defendant in error by combining all of the manufacturers of glucose in the United States of sufficient importance to be considered, had created a monopoly, and was itself for all practical purposes the only seller of this commodity. It is specifically alleged in the answer that the plaintiff in error and all other purchasers were because of this situation forced to commence trading with the defendant in error, and thereby came under the operation of this series of contracts. Can it be doubted that the only purpose of this scheme was to place all purchasers of glucose in such a position that if they failed to trade exclusively with the monopoly, the first break would be attended by a great financial sacrifice?

When competition first sprang up, the purchaser might well doubt whether it would be successful or continue. If he traded with the competitor he at once sacrificed his accrued rebates with the monopoly. That was certain, while the continuation of competition was uncertain. Conceding the exist-

ence of a complete monopoly, as is alleged in this answer, it may well be doubted whether a more adroit scheme could be devised for ~~perpetrating~~ perpetuating its illegal existence. The answer alleges the complete success of the scheme until the prices were advanced to a point so exorbitant that even this scheme was not successful to prevent some competition from arising.

The Court will bear in mind that as in the Continental Wall Paper Company case, this question arises on a general demurrer, and all of these allegations must be taken as true.

It is, therefore, clear that for the purpose of this hearing it must be considered as admittedly true that the contract between the parties with reference to sales had for its purpose and effect the restraining and monopolizing of interstate trade, and was one of a series of contracts with all purchasers which accomplished this result.

We have not discussed whether the provisions of the contracts are on their face violative of the statute, but will discuss later in the argument the proposition on which we rely that the illegal purpose which they accomplished is sufficient to render them illegal.

The sales were made within the knowledge of both buyer and seller with direct reference to and in execution of the illegal agreements.

This is clearly alleged in the answer, and an elaborate discussion of it would be superfluous. The allegations are specific and are admitted for the purpose of the hearing. Indeed since the parties had made a contract which related to all sales between them, it necessarily follows that when the sales themselves were made, they were with reference to and in execution of the contract.

The covenant against re-sale was repeated in each invoice.

Analysis of decision of the Court of Appeals of Georgia.

A study of the opinion of the majority of the Court of Appeals discloses that the Court was unconsciously influenced

by the belief of the two members who constituted the majority of the Court that the dissenting opinion of one of the Justices in the Continental Wall Paper Company case presented the sound rule. We quote from the opinion of the Court of Appeals of Georgia as follows:

> "This Court yields ready assent to any decision of the Supreme Court of the United States involving the construction and effect of a Federal statute. We will give to the decision of that Court in the case last mentioned above full scope and effect, but at the same time we can not bring our minds to agree to the opinion of the majority in that case. On the contrary, we believe that the opinion expressed by the dissenting Justices is the sounder and better view of the law. The Federal Courts have exclusive power to decree illegal a combination formed in violation of the anti-trust act. The illegality of such a combination should be determined by a direct proceeding brought for that purpose in the Federal Court, in accordance with the procedure and practice in that Court, where the corporation assailed has full opportunity to be heard. It ought not to be open to collateral attack in every minor State Court where it may bring an action to enforce one of its contracts of sale. In view of the opinion of the Supreme Court of the United States in the Standard Oil Company and American Tobacco Company cases, it is very doubtful whether that Court as now Constituted will follow this decision."

We do not believe that it is anything in the decisions in the Standard Oil and American Tobacco Company cases, which sustains the theory stated by the Court of Appeals of Georgia, that the illegality of the combination can be determined only by direct proceedings brought for that purpose in a Federal Court. In the Continental Wall Paper Company case, while four Justices dissented, only one of them based his dissent on this ground, and it is, therefore, a fair inference that the other three dissenting Justices, as well as the majority of the Court, did not concur with the views on this point of the fourth dissenting member of the Court.

The distinction which the Court of Appeals of Georgia made between the case at bar and the Continental Wall Paper Company case is based on the theory that in the case at bar the contracts between the parties are not in themselves and on their face illegal, and that even if they were used to accomplish the illegal purpose of the combination, they would not, therefore, become illegal. We quote from the opinion as follows:

> "It is alleged generally in the answer that these contracts were designed for the purpose of preventing competition, and did in fact have such effect. Suppose they did. If their terms were legitimate, and there is nothing in the contracts which would make them illegal, the fact that they may have resulted in binding up the plaintiff's business to such an extent as to enable it to practically control the sale of the commodity would not render the contracts unenforceable."

In another part of the opinion, the Court says:

> "The contracts of the plaintiff in this case may have the effect of lessening, or even in destroying competition, but if the methods employed to bring this about are legitimate and not obnoxious to law, the contracts are not subject to be set aside."

We believe these quotations make very clear the exact point on which the majority of the Court of Appeals decided against us. It is not denied by that Court that the answer sufficiently shows that the defendant in error is an illegal combination; it is not denied that the contracts under which the sales were made are shown to have been for the purpose and effect of accomplishing the illegal purpose of restraining trade; it is not denied that the sales were made with direct reference to these agreements.

It is, however, decided by the Court of Appeals that if the terms of the contracts are legitimate, and if there is nothing in the contracts themselves which would make them illegal,

they can not be attacked as illegal, because they were for the purpose and effect of accomplishing an illegal restraint of trade.

The proposition on which the Court of Appeals based its decision is in conflict with the decisions of this Court.

The case of Nash vs. United States, 229 U. S., 373, is in direct conflict with the proposition quoted above from the Court of Appeals. In that case this Court said:

> "An unlawful intent may be sufficient to convert what on their face might be no more than the ordinary acts of competition, or the small dishonesties of trade into a conspiracy forbidden by the Anti-Trust Act of July 2, 1890."

In Swift & Company vs. United States, 196 U. S., 375, this Court said:

> "It is suggested that the several acts charged are lawful, and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. Aikens vs. Wisconsin, 195 U. S., 194. The statute gives this proceeding against combinations in restraint of commerce among the States, and against attempts to monopolize the same. Intent is almost essential to such a combination, and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen."

See also Loewe vs. Lawlor, 208 U. S., 274, and Aikens vs. Wisconsin, 195 U. S., 194.

In the last case the Court says:

> "The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot, neither its innocence nor the constitution is sufficient to prevent the punishment of the plot by law."

The opinion of the Court of Appeals of Georgia that the Court is limited to the provisions of the contracts themselves and can not consider the purpose for which they were adopted, nor ends which they accomplished, is necessarily in conflict with the decisions of this Court which hold that in all inquiries of this character, the scheme must be treated as an entirety.

Addyston Pipe & Steel Co. vs. United States, 175 U. S., 211;

Swift & Company vs. United States, 196 U. S., 375;

Montague & Company vs. Lowry, 193 U. S., 38;

Loewe vs. Lawlor, 208 U. S., 274.

The decision of the Court of Appeals in this respect is also in conflict with the Continental Wall Paper Company case. The decision in that case is not based on the proposition that the contract under which the sales were made was unlawful on its face. On the contrary, the decision is based on the ground that the contract was unlawful because it was a means of accomplishing the illegal purpose of the combination.

Other authorities to the same effect.

While the decisions of this Court above cited are conclusive, we desire to point out also that there are many well considered cases of other Courts which hold squarely that a contract harmless on its face is illegal if it is one of the means by which an illegal purpose is accomplished. We are discuss-

ing this point fully because the Court of Appeals of Georgia held otherwise on it, and made its ruling to the contrary, the basis of its distinction between the case at bar and the Continental Wall Paper Company case, and the basis of its decision adverse to the plaintiff in error.

In the case of Cravens vs. Carter-Crume & Co., 92 Fed., 479, the Circuit Court of Appeals for the sixth circuit, (Judges Lurton, Severens and Clark) held that the contract under consideration in that case was not illegal in itself, but that since it was a part of an illegal scheme to defraud, it became illegal. The Court said:

> "It was argued by counsel for the plaintiff, that the contract should be sustained within the principle stated and approved in United States vs. Addyston Pipe & Steel Company, upon the theory that the contract upon which the action is based was collateral merely, and did not require the aid of agreements for combinations. But it seems clear to us that this proposition can not be sustained. This contract was one of the steps in the forbidden organization, and was intended to be one of many by which the objects of the corporation were to be accomplished."

In the case of Fink vs. Schneider Granite Company, 187 Mo., 244; 86 S. W., 213, the Court adopted the following statement from the report of the Referee:

> "If the contract in suit stood alone, it would undoubtedly be sustained, but it did not stand alone. It was one of five others, all of which were links and necessary links, in the illegal combination which rendered them illegal."

The following cases are directly in point:

> Pacific Factor Co. vs. Adler, 90 Cal., 110; 23 Am. St. Rep., 102; 27 Pac., 36;

Detroit Salt Co. vs. National Salt Co., 134 Mich., 120; 96 N. W., 1;

United Shoe Machinery Co. vs. LaChappell, 212 Mass., 467; 99 N. E., 289.

It is immaterial whether the showing of illegality comes from the plaintiff or the defendant.

The defendant in error argued in the Court of Appeals of Georgia that since it could make out its case without proving the illegal agreement, the present case was distinguished from the Continental Wall Paper Company case.

While the Court of Appeals of Georgia did not comment on this proposition, it is probably well to refer to it, in view of the fact that there is a recent State decision from the Court of Appeals of Indiana, which attempts to make the same distinction. In Bessire & Company vs. Corn Products Manufacturing Company, 47 Ind. App., 313, the Indiana Court of Appeals considered a case presenting some facts similar to the one at bar. The Court in that case held that as the plaintiff could make out its case without referring to the illegal agreements, the case could be distinguished from the Continental Wall Paper Company case, and the defendant would not be allowed to plead and prove that the sales were a part of illegal agreements. The Court also held that the legality of the plaintiff's organization could only be questioned in a direct proceedings brought by the Government.

Both of these propositions are in conflict with the decisions of this Court. The latter has already been discussed in another part of this brief.

With reference to the first proposition, it is sufficient to say that this Court in repeated decisions has held that it is immaterial whether the evidence of illegality comes from one side or the other. Its disclosure from either side is fatal to the plaintiff's case.

Hall vs. Coppell, 7 Wall., 542;

Armstrong vs. Toler, 11 Wheat., 258;

Embrey vs. Jemison, 131 U. S., 336;

McMullen vs. Hoffman, 174 U. S., 639;

Oscanyan vs. Winchester Repeating Arms Co., 13 Otto., 261.

In the case of Embrey vs. Jemison, supra, suit was brought on a note, and the Court allowed the defendant to plead and prove that the note was given for an immoral consideration, namely, for a gambling consideration. It is obvious that in that case the plaintiff could make out his case simply by proving the note, and that it was necessary for the defendant to plead and prove the illegality. The case is directly in point, and is controlling.

In the case of McMullen vs. Hoffman, supra, suit was brought on a written contract which appeared to be legal. The plaintiff could prove his case by reference only to the legal contract. The defendant was allowed, however, to show that it was connected with a verbal contract which was contrary to public policy, and that the whole arrangement was, therefore, illegal.

The proposition is settled law by the decisions of this Court.

The defence is allowed on the grounds of public policy, and not to protect the defendant. If the Court were seeking to protect the defendant, it would probably have established a rule allowing a credit for the excessive charges extorted by the monopoly, as the rebate is probably nothing but a return of such excessive charges. The rule, however, based on public policy is necessarily broader and refuses the aid of the Court in any matter connected with the illegal agreement.

It is therefore respectfully submitted that this case is controlled by the decision of this Court in the Continental Wall Paper Company case, and that the principles on which that case rests are established by many other decisions of this Court.

Respectfully submitted,

MARION SMITH,

For Plaintiff in Error.